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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

NAVIGATORS SPECIALTY INSURANCE COMPANY, Plaintiff and Respondent, v. PROFESSIONAL BUILDERS, INC., Defendant and Appellant.	B287959 (Los Angeles County Super. Ct. No. EC065130)

APPEAL from an order of the Superior Court of Los Angeles County, Ralph C. Hofer, Judge. Reversed and remanded with directions.

The Blanchard Law Group and Lonnie C. Blanchard III for Defendant and Appellant.

Greenan, Peffer, Sallander & Lally, Robert L. Sallander and Chip Cox for Plaintiff and Respondent.

Defendant Professional Builders, Inc. (Builders) appeals from the trial court's denial of its anti-SLAPP motion to strike the breach of contract cause of action in the complaint brought by its insurer, plaintiff Navigators Specialty Insurance Company (Navigators). Navigators's complaint is based on Builders's behavior in an underlying action in which Builders was sued by the owner of an apartment building for damages to the building. Navigators provided a defense in the case and ultimately settled the case with the building's owner, both under a reservation of rights. Navigators subsequently brought this action seeking reimbursement for the costs of defense and settlement.

Builders contends the trial court erred in determining Navigators had shown a probability of prevailing on its claim. Builders contends that a breach of contract action cannot, as a matter of law, be based on the breach of a cooperation clause in an insurance policy. Builders further contends Navigators did not offer sufficient admissible evidence to make a prima facie factual showing sufficient to sustain a favorable judgment. Although we find Navigators's claim legally sufficient, we agree that Navigators did not make the required prima facie factual showing. The trial court's order denying Builders's motion is reversed and this matter is remanded for further proceedings as set forth in our disposition.

BACKGROUND

In early 2012, Builders entered into an agreement with DiRosario and Daughters, LLC (DiRosario) pursuant to which Builders would arrange for the re-roofing of a DiRosario-owned apartment building on Bunker Hill in Los Angeles (the Building). Builders is owned by Giovanni Eyal Knafo, who is also its CEO. Knafo negotiated Builders's agreement with DiRosario. Builders

arranged for the re-roofing work to be performed by Southwest Roofing (Southwest).

After Southwest Roofing stopped working on the roof for the day on March 23, 2012, a fire broke out on the roof and caused extensive damage. DiRosario looked to its own insurer, Travelers Casualty Insurance Company (Travelers), and Builders for redress. Travelers paid its insured DiRosario $900,000 for the damage, $700,000 of which was for building repairs. Builders looked to its own insurer, Navigators, for redress.

Builders contracted with DiRosario to repair the fire damage for about $700,000. Knafo described this agreement as the "first contract" which was "supposed to be one agreement to do repair the roof." Knafo explained that "Then things has [sic] been changed, and, basically, in the first phase, what we did was just the framing for the roof and then the roofing itself." According to Knafo, Builders agreed to and did repair the roof "according to the insurance settlement" for about $700,000. "[A]fterwards," DiRosario "hire a different public adjuster, that he thought that the building need to be stripped down from whatever reason, that there is mold or asbestos or anything like this. So it's completely change the plans [sic]."

On May 10, 2012, Navigators, Builders's insurer, acknowledged Builders's claim related to the Building fire, and stated any participation by Navigators in the case would be conducted under a reservation of rights.

On January 9, 2013, Travelers filed a subrogation complaint against Builders and Southwest Roofing for damages to the Building. Navigators provided a defense for Builders.

Unbeknownst to Navigators, in or around June 2013, Knafo acquired a 50 percent ownership interest in the Building. Knafo's new and undisclosed ownership interest in the damaged Building complicated the insurance claims. Now Knafo, as part owner of the Building, stood to gain from suing his own company, Builders, because he would potentially receive a settlement from his own company's insurer, Navigators. Knafo was in the middle of a conflict – as an owner/ fire victim he would want as big a settlement as possible, but as the CEO of Builders, the entity allegedly liable for causing the fire, he would want to minimize the settlement amount of any claims against his company.

DiRosario filed a complaint in intervention in the subrogation action, naming Builders and Southwest Roofing as defendants. DiRosario sought compensatory damages of $2 million, in addition to the $900,000 it had already received from Travelers.[1] Among the issues in the case was whether Builders was a general contractor who hired Southwest as a subcontractor or was simply a "paper" contractor who acted as DiRosario's agent in hiring Southwest. This relationship was relevant to a determination of whether Builders had a duty to supervise Southwest's work. The actual amount of damage the building suffered was also disputed.

At some point in the initial lawsuit, Knafo was deposed in his capacity as the person most knowledgeable representing Builders. There is no evidence of the substance of this testimony in the record.

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[1] Travelers dismissed its complaint later in 2014.

On November 13, 2014, Navigators advised Builders that Navigators intended to settle the DiRosario lawsuit for $1 million dollars, the policy limit, subject to its right to seek reimbursement. Builders chose not to assume its own defense. Thereafter, Navigators paid DiRosario $1million to settle the action.

On March 21, 2016, Navigators filed its complaint in this matter, seeking reimbursement of its $1 million settlement payment. Navigators subsequently sought and obtained leave to file a first amended complaint, seeking damages against Builders and Knafo for breach of contract based on their alleged violation of the cooperation clause of the insurance policy. The cause of action reads in its entirety:

"**FIFTH CAUSE OF ACTION**

"(For Breach of Contract)

"32. Navigators incorporates the allegations in paragraphs 1 through 31 of this complaint as though fully set forth in this cause of action.

"33. The Navigators' Policy includes additional terms and conditions that impose additional obligations on Professional Builders, including an obligation to cooperate in the investigation, defense or settlement of a claim or suit.

"34. Section IV of the Navigators Policy included the following terms and conditions:

"c. You and any other involved insured must:

"[¶] . . . [¶]

"(3) Cooperate with us in the investigation or settlement of the claim or defense against the 'suit'[.]

"35. Navigators is informed and believes and on that basis alleges that during the litigation of the Underlying Action, Knafo understood he had an ownership interest in the building at 845 North Bunker Hill Avenue, for which DiRosario & Daughter sought damages.

"36. Professional Builders and Knafo failed to cooperate with Navigators, including but not limited to Knafo's failure to disclose his ownership interest in the building at 845 North Bunker Hill Avenue, and his deposition testimony that unnecessarily affirmed DiRosario's claim for damages, without foundation or factual support.

"37. Navigators is informed and believes and on that basis alleges that Knafo's testimony supported a settlement payment to plaintiff that also benefited Knafo and Professional Builders.

"38. Professional Builders' breach of the terms and conditions of the Navigators' Policy damaged Navigators in an amount to be proven at trial."

The trial court granted Knafo's anti-SLAPP motion directed at this cause of action, and dismissed Knafo as a defendant. The court denied Builders's motion to strike the cause of action. Navigators has not appealed from the court's order granting Knafo's motion.

DISCUSSION

"A SLAPP— a strategic lawsuit against public participation— seeks to chill or punish a party's exercise of constitutional rights to free speech and to petition the government for redress of grievances. [Citation.] The Legislature enacted Code of Civil Procedure section 425.16—

known as the anti-SLAPP statute—to provide a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights." (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055.) Under this statute, a defendant may bring a special motion to strike any cause of action or claim "arising from any act of [the defendant] in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue." (Code of Civ. Proc.[2], § 425.16, subd. (b)(1).)

"The anti-SLAPP statute does not insulate defendants from *any* liability for claims arising from the protected rights of petition or speech. It only provides a procedure for weeding out, at an early stage, *meritless* claims arising from protected activity. Resolution of an anti-SLAPP motion involves two steps. First, the defendant must establish that the challenged claim arises from activity protected by section 425.16. [Citation.] If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success. We have described this second step as a 'summary-judgment-like procedure.' [Citation.] The court does not weigh evidence or resolve conflicting factual claims. Its inquiry is limited to whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment. It accepts the plaintiff's evidence as true, and evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law. [Citation.] '[C]laims with the requisite minimal merit may

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[2] All further references are to the Code of Civil Procedure unless otherwise indicated.

proceed.' [Citation.]" (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384–385, fn. omitted (*Baral*).)

On appeal, we review de novo the trial court's order granting or denying an anti-SLAPP motion. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325.) " 'We consider "the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based." (§ 425.16, subd. (b)(2).) However, we neither "weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law." [Citation.]' " (*Flatley v. Mauro*, at p. 326.)

A. First Step

"At the first step, the moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them. When relief is sought based on allegations of both protected and unprotected activity, the unprotected activity is disregarded at this stage. If the court determines that relief is sought based on allegations arising from activity protected by the statute, the second step is reached." (*Baral*, *supra*, 1 Cal.5th at p. 396.)

The trial court found Builders had satisfied its burden in the first step. The court ruled "the fifth cause of action for breach of contract as alleged and argued in the opposition arises out of protected activity, that is, deposition testimony, which is conduct occurring before a judicial proceeding, so arising from petitioning activity." After independently reviewing the issue, we reach the same conclusion.[3]

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[3] Builders contends that because Navigators did not appeal from the trial court's order granting the anti-SLAPP motion as to

Builders identified one allegation of protected activity: statements made by Knafo during his deposition as Builders's representative, which caused Navigators to settle the claim for $1 million. Statements made at a deposition are litigation-related activity for purposes of section 425.16. (*Sipple v. Foundation for Nat. Progress* (1999) 71 Cal.App.4th 226, 237–238.) Navigators's complaint also contains an allegation of unprotected activity: Builders's failure to disclose that Knafo had

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Knafo, Navigators is precluded by the doctrine of collateral estoppel from challenging the trial court's ruling that the first step of the anti-SLAPP test has been satisfied. The traditional application of collateral estoppel is to successive prosecutions or to rulings from a former action. (*People v. Barragan* (2004) 32 Cal.4th 236, 253.) "The California Supreme Court and Courts of Appeal have expressed doubt that the doctrine of collateral estoppel applies in further proceedings in the same litigation . . . . The issue, however, has not been resolved definitively." (*People v. Yokely* (2010) 183 Cal.App.4th 1264, 1273; *People v. Barragan*, at p. 253 [noting Court has not yet decided whether collateral estoppel " 'even applies to further proceedings in the same litigation.' "].)

Builders does not acknowledge the unsettled state of the law, or provide any argument to support a resolution of this open question. "[A]n appellant is required to not only cite to valid legal authority, but also explain how it applies in his case." (*Hodjat v. State Farm Mutual Automobile Ins. Co.* (2012) 211 Cal.App.4th 1,10.) "[W]e may disregard conclusory arguments that are not supported by pertinent legal authority or fail to disclose the reasoning by which the appellant reached the conclusions he wants us to adopt." (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 287.) We do so with Builders's claim of collateral estoppel.

an ownership interest in the Building. For purposes of this first step, however, we disregard the allegation of unprotected conduct. (*Baral*, *supra*, 1 Cal.5th at p. 396.)

The allegation of protected activity in the complaint underlies and supports Navigators's claim for breach of the obligation to cooperate. Navigators specifically alleged that "Professional Builders and Knafo failed to cooperate with Navigators, including but not limited to Knafo's . . . deposition testimony that unnecessarily affirmed DiRosario's claim for damages, without foundation or factual support." (FAC ¶ 36.) The protected activity also underlies and supports Navigators's prejudice from the breach: Navigators alleged that "Knafo's testimony supported a settlement payment to plaintiff that also benefited Knafo and Professional Builders." (FAC ¶ 37.)

Navigators contends the allegations concerning Knafo's deposition testimony are merely the "evidentiary landscape" of its claim for breach of contract. The breach, Navigators argues, is Builders's non-disclosure of Knafo's ownership in the Building.

"Allegations of protected activity that merely provide context, without supporting a claim for recovery, cannot be stricken under the anti-SLAPP statute." (*Baral*, *supra*, 1 Cal.5th at p. 394; *Newport Harbor Offices & Marina, LLC v. Morris Cerullo World Evangelism* (2018) 23 Cal.App.5th 28, 43–44 (*Newport Harbor*).) Navigators's allegations concerning Knafo's deposition testimony are not merely contextual or part of the evidentiary landscape, however.

Navigators's contention that its "claim for breach of contract is not based on an allegation that Knafo's deposition testimony violated any commitment or obligation" is inconsistent with the plain language of Navigators's complaint, which does in fact expressly allege Knafo's deposition testimony as a failure to cooperate. (See *Newport Harbor*, *supra*, 23 Cal.App.5th at p. 47 [when plaintiff alleged defendant breached the Sublease by engaging in the protected activities of issuing notices and letters, the allegations of protected activities "do not simply provide context for or evidence of the parties' disputes."].)

Navigators also argues that it was prejudiced not by Knafo's deposition testimony but because it "was compelled to settle for $1 million, because Professional Builders breached its duty to cooperate by failing to inform Navigators of Knafo's one-half ownership of the Bunker Hill Building." Again, this argument is not consistent with the language of Navigators' complaint, which alleges that "Knafo's testimony supported a settlement payment to plaintiff that also benefited Knafo and Professional Builders." There is no allegation in the complaint that Knafo's nondisclosure "compelled" Navigators to settle, or even that the nondisclosure "supported" the settlement payment.

"[W]e, like the trial court, must take the challenged pleading as we find it." (*Okorie v. Los Angeles Unified School Dist*. (2017) 14 Cal.App.5th 574, 598.) Even if Navigators could have alleged a different theory of Builders's breach of the cooperation clause, it did not so. "There is no such thing as granting an anti-SLAPP motion with leave to amend." (*Dickinson v. Cosby* (2017) 17 Cal.App.5th 655, 676.)

Builders has satisfied its burden of showing that Navigators has made allegations of protected activity and those allegations support Navigators's claim for relief.

B. Second Step

At the second step, "the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success. We have described this second step as a 'summary-judgment-like procedure.' [Citation.]" (*Baral*, *supra,* 1 Cal.5th at p. 384.) In order to establish a probability of prevailing on the claim, "the plaintiff 'must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.' [Citations.] In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant (§ 425.16, subd. (b)(2)); though the court does not *weigh* the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim. [Citation.]" (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.) The plaintiff's showing of facts must consist of evidence that would be admissible at trial. (*Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1346.)

Builders claims that Navigators's cause of action for breach of contract is legally insufficient because breach of the cooperation clause in an insurance policy creates only a defense, not an affirmative cause of action. We disagree. As the cases cited by Builders show, an insured's duty to cooperate is a condition of coverage. (See e.g., *Valladao v. Fireman's Fund*

Indem. Co. (1939) 13 Cal.2d 322, 337[condition precedent]; *Insurance Co v. Roman Catholic Archbishop* (9th Cir. 2007) 227 Fed. Appx. 643, 644 (*INSCOP*) [same]; see also *O'Morrow v. Borad* (1946) 27 Cal.2d 794, 800 [regardless of whether duty to cooperate is a condition precedent or condition subsequent, insurer is released from contract by insured's total failure to cooperate].) As Navigators argues, however, the California Supreme Court has recognized that if an insurer has a coverage defense, it is entitled to make a settlement payment under a reservation of rights to seek reimbursement on the ground the claim was not covered. (*Blue Ridge Ins. Co. v. Jacobsen* (2001) 25 Cal.4th 489, 492; see *INSCOP*, at p. 644.) Builders offers no argument or authority for precluding the application of *Blue Ridge* to coverage defenses based on cooperation clauses.[4] Thus,

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[4] Navigators acknowledges that it did not expressly identify the cooperation clause as a basis for its reservation of rights. Under California law, an insurer does not waive a coverage defense if it was not aware of the defense when it issued its reservation of rights letters. (*Ringler Associates Inc. v. Maryland Casualty Co.* (2000) 80 Cal.App.4th 1165, 1188-1189.) Navigators produced admissible evidence that it was not aware of Builders's breach of the cooperation clause until well after it issued its two reservation of rights letters.

Navigators also acknowledges that the trial court sustained Builders's hearsay objection to its May 2012 reservation of rights letters. We can and do consider the letter for the non-hearsay purpose of showing that the statements in the letter were made, specifically that Navigators stated that it was reserving its rights. (See, e.g., *Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 109 ["A well-established exception or departure from the hearsay rule applies to cases in which the very fact in controversy is whether certain things were said and not whether

Navigators has shown that it has an affirmative claim for reimbursement; legal insufficiency is not a basis for granting the anti-SLAPP motion.

Builders also contends Navigators has not shown its complaint is "supported by a sufficient prima facie showing of facts to sustain a favorable judgment." We agree with this contention.

Navigators states that it does not contend it was entitled to specific deposition testimony from Knafo. Navigators's pleadings, however, contain just such contentions. As pled, Navigators claims that Knafo failed to cooperate when he gave deposition testimony that was "without foundation or factual support" (FAC ¶ 36) and this baseless testimony "supported" a $1 million settlement payment to DiRosario that also benefited Knafo and Builders (FAC ¶ 37.) Thus, in order to prevail on this claim, Navigators would have to offer evidence that Knafo's testimony was "without foundation or factual support" and/or evidence showing a lower valuation of the case. Navigators has failed to do so.

Navigators in fact offered no evidence of the substance of Knafo's deposition testimony in the underlying action, let alone evidence showing that testimony to be baseless. Instead, it offered a declaration from its claims specialist generally stating that Knafo's testimony was "unfavorable." "Unfavorable" is not the same as "without foundation or factual support."

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these things were true or false, and in these cases the words are admissible not as hearsay, but as original evidence."].)

Navigators did offer evidence that Builders initially agreed to perform roof repair work on the Building for $700,000, the amount of the Travelers's payment to DiRosario. Knafo so testified in his deposition in this action and further testified that in accordance with this agreement "what we did was just the framing for the roof and then the roofing itself." There is no evidence that Builders received more than $700,000 for the roof repair work.

Navigators suggests that Knafo's testimony in the underlying action that damages to the Building were more than $700,000 shows that Knafo's testimony was baseless. As we have mentioned, there is no evidence of the substance of Knafo's testimony in the underlying action. Even if we inferred from Navigators's decision to settle the case for $1 million that Knafo somehow testified that damage to the Building was $1,700,000 rather than $700,000, a mere change in amount would not be sufficient to support a rational inference that Knafo's testimony was "without foundation or factual support." The law is replete with cases considering payment disputes where the final cost of construction exceeded the initial contract price. (See, e.g. *Willdan v. Sialic Contractors Corp.* (2007) 158 Cal.App.4th 47 [increased construction costs due to latent defects]; *Camrosa County Water Dist. v. Southwest Welding & Mfg. Co.* (1975) 49 Cal.App.3d 951 [increased costs due to inflation].)

Navigators suggests that the mere timing of Knafo's deposition testimony undermines his credibility and could support an inference that his testimony was baseless, because Knafo increased his estimate of damages after acquiring an ownership interest in the building. Navigators, however, has not offered admissible evidence of the date of Knafo's deposition in

the underlying action, and so there is no evidence that he acquired his ownership interest before his "unfavorable" deposition testimony. Even if we were to assume such timing,[5] we could not disregard Knafo's testimony, offered by Navigators as part of the description of the scope of Builders's $700,000 contract with DiRosario, that, after entering into the initial agreement to repair the roof, DiRosario "hire[d] a different public adjuster, that he thought that the building need to be stripped down from whatever reason, that there is mold or asbestos or anything like this. So it's completely change the plans [sic]." The public adjuster's opinion concerning contamination of the Building is certainly a basis for an increased damage estimate.

In opposing the anti-SLAPP motion, Navigators offered other theories of Builders's failure to cooperate; Navigators's claims of prejudice, however, are based on the unfavorable substance of Knafo's testimony and the premise that the testimony is baseless. As we discuss below, if Knafo's testimony had been favorable to Navigators, Navigators would have suffered no prejudice from Knafo's pre-deposition non-cooperation.

Navigators offered evidence which it claimed showed prejudice from Knafo's non-disclosure of ownership in the Building. Navigators's Claims Specialist Ron Kojima stated in his declaration that Navigators would never have relied on Knafo's testimony if it had known Knafo owned half the Building.

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[5] DiRosario testified that the ownership agreement was entered into in the summer of 2013. The underlying lawsuit began in January 2013 when Travelers filed a subrogation complaint against Builders; DiRosario intervened in January 2014.

Navigators would instead have asked defense counsel to identify other non-conflicted witnesses and "to consider expert witnesses who could testify regarding Professional Builders' duties to DiRosario, and DiRosario's alleged damages."

The trial court agreed with Navigators and found that Builders's non-disclosure of Knafo's ownership interest "prevented the insurer from investigating properly and selecting appropriate witnesses in connection with the valuation of the claim in the underlying action, which breach prejudiced plaintiff and gives rise to a basis for recouping funds paid under the policy pursuant to a reservation of rights." We reach a different conclusion, however, concerning prejudice.

There is no presumption of prejudice from the breach of a cooperation clause. The insurer must prove prejudice. (*Campbell v. Allstate Ins. Co.* (1963) 60 Cal.2d 303, 306–307.) Thus, "[w]here an insured violates a cooperation clause, the insurer's performance is excused *if* its ability to provide a defense has been substantially prejudiced. [Citations.]" (*Truck Ins. Exchange v. Unigard Ins. Co.* (2000) 79 Cal.App.4th 966, 976, italics added.) "Although it may be difficult for an insurer to prove prejudice in some situations, it ordinarily would be at least as difficult for the injured person to prove a lack of prejudice, which involves proof of a negative." (*Campbell*, at p. 307.)

The mere fact that Navigators was "prevented" from investigating before the settlement does not establish prejudice. Inability to investigate fully does not equate to prejudice. (See *Belz v. Clarendon America Ins. Co.* (2007) 158 Cal.App.4th 615, 632 [insurer "merely asserts that [insured's] default interfered with its ability to conduct a thorough investigation and to present a defense in the underlying suit. But that assertion assumes 'too

lenient [a] test' for prejudice."]; *Northwestern Title Security Co. v. Flack* (1970) 6 Cal.App.3d 134, 142–143 ["prejudice does not arise merely because a delayed or late notice has denied the insurance company the ability to contemporaneously investigate the claim or interview witnesses"].)

Assuming for the sake of argument that Navigators was prevented by Knafo's non-disclosure from investigating and seeking other witnesses before settling the underlying lawsuit, Navigators offers no explanation for its failure to allege what those other witnesses would have testified to with respect to the $1 million settlement.[6] Navigators would have been prejudiced in settling the underlying action only if the thwarted investigation would have produced evidence which would have enabled Navigators to settle for a lesser amount or to determine trial was a better option than settlement. Navigators did not allege any such favorable evidence in this action. It did not, for example, offer witnesses or evidence contradicting or calling into question Knafo's deposition testimony in one or more respects; nor did Navigators allege evidence supporting a lower valuation of the claim. If an investigation would have uncovered only

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[6] Alternatively, Navigators could have claimed the delay in learning of the need to investigate made a proper investigation impossible and offered supporting evidence. (See, e.g., *1231 Euclid Homeowners Assn. v. State Farm Fire & Casualty Co.* (2006) 135 Cal.App.4th 1008, 1020–1021 [insurer would be prejudiced if insured were allowed to file bad faith suit in 2001 based on 1994 earthquake damage where insured had withdrawn its prior earthquake claim one month after earthquake—justifying insurer's decision to halt investigation—and insured had since repaired damaged areas—altering evidence relevant to bad faith suit].) Navigators made no such claim.

evidence which supported Knafo's testimony, Navigators would have suffered no apparent prejudice from Knafo's non-disclosure and its inability to investigate independently.

Navigators also alleged that it "anticipated" Knafo would provide favorable testimony and relied on Knafo to testify favorably on behalf of Builders. The trial court did not refer to this theory of the case in its ruling. There are no allegations related to anticipation of favorable testimony in the complaint and no evidence linking Navigators's anticipation to statements or conduct by Knafo or Builders. Even if Navigators had pled such anticipation and provided evidence linking conduct or statements by Knafo or Builders to the anticipation, Navigators would still not have shown a probability of prevailing on this theory of the case. It was DiRosario who decided to depose Knafo, and Navigators offers no theory of how it could have prevented the deposition. At most, if Navigators had known that Knafo would not testify favorably on Builders's behalf, Navigators could have independently investigated the issues in the case to determine whether other witnesses might offer testimony favorable to Navigators. If such favorable testimony were obtained, Navigators could then make an informed decision whether to settle or go to trial. Navigators argues that it was "not prepared to respond" to Knafo's unexpected testimony and had not identified other witnesses. While Navigators may not have been prepared initially, Knafo's testimony occurred during a deposition, not at trial. Navigators offers no evidence of constraints on its preparation after the deposition. More significantly, in opposing the anti-SLAPP motion more than three years after settling the underlying action, Navigators offers no

evidence that other witnesses would have provided favorable testimony for Navigators.

C. Conclusion

The heart of Navigators's claim is that it settled the case for too high an amount based on Knafo's baseless and unfavorable deposition testimony. This is the claim it pled in its complaint. Deposition testimony is a protected activity under the SLAPP statute.

In opposition to Builders's anti-SLAPP motion, Navigators pointed to two other instances of non-cooperation by Builders, both of which consisted of non-protected activity. As we discuss above, Navigators has failed to identify any prejudice from this non-cooperation.

Because Navigators's claim is based on protected activity, Navigators was required to show a probability of prevailing on its claim. It failed to do so. The trial court erred in denying Builders's motion to strike the fifth cause of action.

DISPOSITION

The order denying Builders's motion to strike is reversed, and this matter is remanded with directions to the trial court to enter an order granting the motion and striking Navigators's fifth cause of action, and to determine the appropriate attorney fees and costs to be awarded to Builders as the prevailing party on the motion. Builders is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

STRATTON, J.

We concur:

BIGELOW, P. J.

RUBIN, J.*

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* Presiding Justice of the Court of Appeal, Second Appellate. District, Division Five, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.